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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5908

LEON CHAMBERS,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Mississippi with the dissenting opinion of Justice Rogers (A. 150-58)[1] is

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[1]References to "A." are to the single printed appendix which the parties prepared for the Court. References to "R." are to the original record of the circuit court of Amite County which has been filed with the Clerk.

reported at 252 So. 2d 217 (1971). No opinion was rendered by the circuit court of Amite County, Mississippi.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on June 28, 1971 (A. 159), and rehearing denied on September 14, 1971 (A. 160). Mr. Justice Stewart signed an order on November 29, 1971, extending to December 23, 1971, the time for filing the petition for writ of certiorari. The petition for writ of certiorari was filed on December 23, 1971, and was granted on March 20, 1972 (A. 165). The jurisdiction of this Court rests on 28 U.S.C. §1257(3). Mr. Justice Powell admitted the petitioner to bail by entering an order on February 1, 1972 (A. 162) that he reaffirmed with opinion on February 14, 405 U.S. 1205 (A. 162-63).

QUESTIONS PRESENTED

The petitioner Leon Chambers was charged with murder and put on trial for his life. He based his defense on being able to show that another man, Gable McDonald, had repeatedly confessed to the crime. State rules of evidence prevented him, however, from demonstrating his innocence. First, Mississippi hearsay rules prevented Chambers from introducing McDonald's oral confessions. Second, when McDonald appeared as a defense witness and retracted his written confession, Mississippi witness rules prevented Chambers from cross-examining and impeaching him. The questions presented are:

1. Does the Mississippi hearsay rule violate the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment

insofar as it prevents witnesses for the accused from testifying that someone else confessed to the crime?

2. Does a witness for the accused become a witness against him, within the meaning of the Sixth and Fourteenth Amendments, when he gives material testimony that directly contradicts the defense?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT

The petitioner Leon Chambers was convicted in October, 1970, and sentenced to life imprisonment for the murder of Officer Aaron Liberty. Chambers asserted his innocence at trial and based his defense on showing that another, Gable McDonald, had killed Officer Liberty.

Mississippi rules combined to prevent Chambers from offering McDonald's oral confessions, and from cross-examining and impeaching McDonald as an adverse witness. He argued on appeal that the Mississippi hearsay and witness rules were unconstitutional as applied, insofar as they prevented him from proving his innocence. The Supreme Court of Mississippi affirmed his

conviction on June 28, 1971, over the dissent of Justice Rogers (A. 150-58).

1. The Shooting

Officer Liberty, a black policeman, was killed on the night of June 14, 1969, while making an arrest. An unruly crowd of fifty to sixty blacks had gathered to prevent him and fellow officers from arresting a black youth for disturbing the peace. While standing guard with a riotgun, Liberty was shot four times in the back and side from somewhere in the alley behind him. He could not have seen who shot him (A. 63; R. 208, 245), but before he died, he turned and fired two shots into the alley.

The first shot passed over the heads of the crowd. The second struck petitioner Chambers who, by that time, was running down the alley (R. 246). Chambers fell to the ground with severe head wounds. The officers assumed he was dead and left him in the alley.[2] He lay there until several acquaintances, including Gable McDonald, gathered him up and drove him to the hospital. When the sheriff learned that night that Chambers was still alive and wounded, he placed him under arrest.

2. The Pretrial Proceedings

Chambers and one James Williams[3] were jointly indicted in October, 1969, for the murder of Officer

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[2]Deputy Sheriff Anthony: "[T]his man fell, and fell so hard, I never seen anything fell no harder and wasn't dead" (R. 184); Deputy Sheriff Geter: "I though he was blowed all to pieces" (R. 216).

[3]There was no evidence that more than one person shot Officer Liberty. The shots all apparently came from a single

Liberty. The Reverend Stokes, a local preacher and civil rights leader, learned meanwhile that Gable McDonald had admitted within hours of the shooting that it was he who killed Officer Liberty. Acting on his own initiative, Stokes contacted McDonald shortly after Chambers was indicted. McDonald talked with Stokes on November 8, 1970, and agreed to give a sworn confession.

Stokes called Chambers' lawyer and informed him, for the first time, that McDonald had confessed to the murder (R. 362-64). They arranged a meeting for the following Monday, November 10, at which McDonald gave a sworn statement that he shot Officer Liberty (A. 13-18; R. 361-74). The statement was then read back to McDonald, and he signed it under oath.

McDonald freely confessed to the murder, despite his own apprehension about repeating the confession in court.[4] He was confessing, he said, because another

.22-caliber gun. The fact that the state proceeded against both Chambers and Williams belies any suggestion that it knew who shot Officer Liberty.

The state could not prove that Williams shot Officer Liberty. Williams was present at the scene of the attempted arrest. He was wrestling with the police and shouting "kill 'em" about the time Officer Liberty was shot. Later, he used his car to drive Chambers to the hospital. But that was all. The court directed a verdict in his favor after presentation of the state's case (R. 496).

[4]Q. You heard [the Reverend] Mr. Stokes that he had told you to tell the truth, and nothing but the truth. You realize that you are not under arrest, that you are not detained in any way by us or anyone else. A. Yes, sir.

Q. Did you come voluntarily? A. Yes.

Q. Nobody compelled you to come? A. No.

* * * * *

Q. I want to make it clear to you that you are not compelled to tell us anything; do you understand that? A. Yes, sir.

[footnote continued]

person (James Williams) already knew that he killed Liberty (A. 15-17). He said that he used his own gun to shoot Officer Liberty, and discarded it afterwards. He specifically described the unusual weapon as a nine (9) cartridge .22-caliber revolver. McDonald was then taken to the sheriff, who placed him under arrest.

McDonald retracted his signed confession one month later (A. 19-59). He claimed at his preliminary hearing in December that the Reverend Stokes induced him to confess by promising that he "wouldn't have to go to jail" (R. 50), and that he would share in the proceeds of a lawsuit by Chambers against the City of Woodville. He denied that he shot Officer Liberty and claimed that he was in a local cafe at the time of the shooting.

The state did not challenge McDonald's retraction. It was apparently unaware that McDonald had independently and separately confessed to three of his acquaintances within hours after the shooting. The justice of the peace accepted McDonald's retraction and, in the absence of other evidence, dropped the charges against him.

---

* * * * *

Q. Who shot Officer Liberty? A. I did.

Q. What type of gun did you use? A. A .22 caliber.

Q. Who did it belong to? A. Me.

* * * * *

Q. Where was Officer Liberty? A. Right in front of me.

Q. Where did the shot strike his body? A. I imagine it did, he flinched.

* * * * *

Q. Are you willing to testify in court if you are called upon to do so? A. No, not unless I had to.

Q. But if you were called upon to do so would you tell the truth? A. I do not know, it is pretty rough in some things. (A. 13-18).

3. The Trial

Ten months later, in October, 1970, Chambers was put on trial for his life.[5] He defended his innocence on two grounds.

First, he denied that he shot Officer Liberty. Thomas Russ, who stood near and watched Chambers during the shooting, swore that Chambers did not shoot Officer Liberty (A. 131-32). Three of Liberty's fellow officers, including a deputy sheriff who was standing three feet from Liberty (R. 183) and six feet from Chambers (R. 242), denied seeing Chambers with a gun.[6] The state never found the .22-caliber murder weapon, despite a "diligent search" of the alley where Chambers fell (R. 228). Nor was there any evidence that Chambers owned a .22-caliber gun.

Second, and again in his own defense, Chambers accused Gable McDonald of killing Officer Liberty. The external evidence pointed to McDonald. One witness, who saw McDonald in the alley, swore that he saw McDonald shoot Liberty (A. 70). Officer Liberty's first cousin, William Vaughn, saw McDonald carrying a pistol immediately after the shooting (A. 139-41). Finally, McDonald admitted that he owned two .22-caliber pistols—a nine-shot .22 that he "lost" before the shooting, and another .22 magnum that he purchased just after the shooting (A. 80-82, 138-39; R. 353).

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[5]Venue was transferred to Amite County from Wilkinson County after the defense submitted that the malice of the local police and sheriff's office would frustrate the impaneling of an impartial jury in Wilkinson County (A. 6-9).

[6]A fourth deputy sheriff, Gordon Geter, remembered at trial that he had seen Chambers shoot Officer Liberty sixteen months earlier. Yet the record shows that Geter spent the very day after the murder nervously questioning members of the black community to discover who shot Liberty (R. 304-06).

Chambers based his case against McDonald on McDonald's own confessions. But a hapless combination of rules frustrated his defense. On the one hand, Mississippi hearsay rules barred his witnesses from repeating McDonald's oral confessions. On the other hand, after McDonald appeared as a defense witness and retracted his written confession, Mississippi witness rules barred the defense from cross-examining him and from impeaching him with prior oral confessions.

Chambers began his defense as follows: He first moved to introduce McDonald's oral confessions. He called Sam Hardin who had grown up with McDonald and attended church with him. Hardin drove McDonald home after the shooting. On the way home, McDonald confessed that he shot Officer Liberty.[7] However, the state objected that the confession was hearsay, and the court instructed the jury to disregard it (A. 73).

Chambers tried next to offer McDonald's second confession. He called Berkley Turner who knew McDonald and helped him carry Chambers to the hospital. The court refused, however, to permit Turner to testify in the presence of the jury. Turner was allowed to make his statement only after the jury had been excused. He stated for the record that on the way to the hospital McDonald told him that he shot Liberty. McDonald also warned Turner several days later not to go to the police ("mess him up").[8]

---

[7]A. When I got ready to come home, he come and asked me, he said, can I go home with you. I told him, yes, you can go home with me.

* * * * *

Q. All right, now, on that ride home, did Gable McDonald tell you that he had killed Aaron Liberty or shoot him? A. He did. (A. 73).

[8]Q. All right, did at that time, either going to or coming back

The defense tried to offer McDonald's confession to Turner as a hearsay exception for declarations against penal interest. The court refused to recognize such an exception (A. 128). The jury was not allowed to hear McDonald's confession to Turner.

Denied the benefit of McDonald's oral confessions, the defense offered his written confession. To lay a basis for the sworn statement, the defense had no choice but to call McDonald as a defense witness.[9] At the same time, because McDonald had already retracted his written confession once, the defense moved to examine McDonald as an "adverse witness" through the use of leading questions and cross-examination (A. 10-12). The court subpoenaed McDonald as a defense witness, but reserved ruling on the adverse-witness motion (A. 60-61).

On that basis, the defense examined McDonald narrowly. It questioned him only for the limited purpose of authenticating his written confession and reading it to the jury. It refused to provoke statements from McDonald that it could not cross-examine or impeach.

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from Centerville [Hospital], Gable McDonald tell you that he shot Aaron Liberty? A. He said that he was the one.

* * * * *

Q. All right, now, Berkley, did he ever tell you that again? A. He didn't put in that word, but I met him I don't know, about the following Sunday after then or a week later, but anyway he said just don't mess him up.

* * * * *

Q. And when he told you don't mess him up, you– A. Well, I just figured that he was the one did it.

* * * * *

Q. And he had already told you that he did it? A. Yes, sir. (A. 129).

[9]Mississippi makes no provision for the court to call its own witnesses.

When examined in turn by the state, McDonald retracted his sworn confession and denied any part in the shooting. He said that he was drinking beer with Berkley Turner at the time. He denied carrying a gun that day and claimed to have lost his own nine-shot .22 revolver several months before the shooting (A. 94-120).

McDonald's testimony for the state directly contradicted evidence in the record. Berkley Turner denied even seeing McDonald before the murder (A. 122). William Vaughn testified that he saw McDonald with a gun just after the shooting (A. 141). Sam Hardin said that he personally saw McDonald shoot Officer Liberty (A. 70).

More important, McDonald's testimony directly contradicted the case for the defense. Chambers based his defense on showing that it was not he, but McDonald who killed Liberty. Yet when he moved again to cross-examine McDonald, the court ruled that McDonald was not "adverse" to him under Mississippi law:

> "He may be hostile, but he is not adverse in the sense of the word, so your request will be overruled" (A. 121).

Finally, denied the right to cross-examine McDonald, the defense tried to impeach him with still a third prior confession. It called Albert Carter. McDonald had known Carter for twenty-five years and visited him the day following the murder. But the court again excused the jury, and did not allow it to hear Carter's testimony.

Carter then stated for the record that McDonald had confessed to the shooting (A. 133-39). McDonald explained to Carter that he shot Officer Liberty because he was afraid that otherwise, Liberty would shoot him. He told Carter that he used his own .22 revolver and that he concealed it after the shooting.[10]

---

[10]Q. Did he [Gable McDonald] ever tell you, Albert, that he was the one who shot this man? A. He did.

The defense offered Carter's testimony—not as hearsay—but for the purpose of impeaching McDonald with a prior inconsistent statement. The court rejected the offer. It had already barred the defense from cross-examining McDonald, and on the same basis, it now barred the defense from impeaching him with a prior confession (A. 139).

4. The Verdict and Appeal

On October 29, 1970, the jury found Chambers guilty of murder and imposed a sentence of life imprisonment. The defense moved under the Fourteenth Amendment to set aside the verdict for failure to receive McDonald's oral confessions and to permit the defense to cross-examine and impeach McDonald (A. 146-47) The motion was denied (A. 148).

Chambers appealed his conviction to the Supreme Court of Mississippi. He urged the court to treat McDonald's oral declarations against interest as an exception to the state hearsay rule and argued in addition, that he had a federal constitutional right to call Hardin, Turner and Carter as witnesses on his behalf. He also argued that he had a right under both state law and

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* * * * *

Q. Did he tell you why he shot him? A. He said if he hadn't shot him, he was going to shoot him.

* * * * *

Q. That's why he, Gable, shot Liberty because if he didn't Liberty was going to shoot him, Gable, or somebody? A. Yes, sir.

Q. Did he tell you what kind of gun that was that he did the killing with? A. Yes, sir .... A twenty-two revolver.

* * * * *

Q. Did he tell you where he put the twenty-two? A. Yes, sir .... He said he had left it at Ed Cain's. (A. 137-38).

federal constitutional law to cross-examine and impeach McDonald as a witness against him.

The court did not expressly address his constitutional claims, but nonetheless implicitly denied them (A. 150-55).[11] It held that McDonald's oral confessions were inadmissible under the Mississippi hearsay rule. In doing so, it rejected a proposal by Justice Rogers to create a hearsay exception for declarations against penal interest. It further held that Chambers had no right to cross-examine and impeach McDonald as a witness against him, because McDonald did not directly incriminate him:

> "McDonald's testimony was not adverse to appellant; it was merely in McDonald's defense and in explanation of his rather unusual confession. Nowhere did he point the finger at Chambers" (A. 154).

Justice Rogers, in dissent, would have allowed Chambers to offer McDonald's prior confessions to impeach him (A. 156-58).

SUMMARY OF THE ARGUMENT

Chambers was denied a fair trial in violation of the Sixth and Fourteenth Amendments. The Mississippi hearsay rule barred him from offering the exculpatory testimony of witnesses in his favor. The party-witness rule barred him from confronting the witnesses against him. They effectively prevented him from putting on a defense.

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[11]The constitutional questions were properly before the court below and necessarily passed upon. See *Street v. New York*, 394 U.S. 576, 581-82 (1969).

I. The Mississippi hearsay rule is unconstitutional, as applied in this case, because it deprived Chambers of exculpatory testimony for no legitimate reason. The rule bars the accused in a criminal proceeding from offering third-person confessions to exculpate himself. It operated here to prevent witnesses for Chambers from testifying that another, Gable McDonald, had confessed to the murder of Officer Liberty.

Chambers has a constitutional right to offer testimony on his behalf. The Due Process Clause of the Fourteenth Amendment prohibits the states from denying the accused the benefit of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Due Process gives the accused not only access to material evidence in his favor, but an opportunity to offer it on his behalf.

The Fourteenth Amendment further protects exculpatory testimony through the Compulsory Process Clause of the Sixth Amendment. The Compulsory Process Clause guarantees the accused the benefit of "witnesses in his favor." It entitles him to secure their presence at trial and offer their testimony to the jury. *Washington v. Texas*, 388 U.S. 14 (1967). Like the Due Process Clause, it operates as a constitutional rule of evidence to render admissible on behalf of the accused the material testimony of witnesses in his favor.

The Mississippi rule furthers no governmental interest that would justify its constitutional burdens. It has been called "an intellectual disgrace to our system of evidence." It rests on an untenable distinction between declarations against penal interest and declarations against pecuniary interest. It discriminates against the accused, by forbidding him to use third-person confessions in his favor while permitting the state to use them against him. Finally, it serves no purpose here, where external evidence corroborated the confessions and the declarant himself was present at trial.

II. The accused in a criminal proceeding has a Sixth and Fourteenth Amendment right to cross-examine the witnesses "against" him and impeach them with prior statements. The court below ruled that McDonald did not testify against Chambers, because he did not directly incriminate Chambers. To that extent, it denied Chambers an opportunity to defend himself and arbitrarily abridged his right of confrontation.

The right of confrontation entitles the accused to cross-examine and impeach any person whose adverse testimony has a material bearing on his defense. Chambers based his defense on proof of McDonald's guilt. McDonald was the only other person under suspicion. To that extent, he and Chambers had opposing interests in the outcome of the trial. McDonald became a witness against Chambers when he retracted his sworn confession and denied any part in the murder.

Chambers was barred from confronting McDonald as a witness against him by a local rule that prohibits a party from impeaching his own witness. The rule is a "serious obstruction to the ascertainment of truth" because it permits false testimony to pass unexamined and unimpeached. It rests on the irrational assumption that a party has a real choice about the witnesses he calls. Finally, its purposes are better served by allowing the court to call its own witnesses and subject them to neutral and restrained examination by both parties.

ARGUMENT

I.

THE MISSISSIPPI HEARSAY RULE IS UNCONSTITUTIONAL INSOFAR AS IT PREVENTS WITNESSES FOR THE ACCUSED FROM TESTIFYING THAT SOMEONE ELSE CONFESSED TO THE CRIME

A state rule is unconstitutional whenever it burdens a "fundamental personal right" for less than "compelling" reasons. *Dunn v. Blumstein*, 405 U.S. 330, (1972).[12] The Mississippi hearsay rule prevented Chambers from exercising his rights under the Sixth and Fourteenth Amendments to offer the testimony of witnesses in his favor. The rule is unconstitutional because it interfered with his constitutional rights without furthering a legitimate state interest.

A. Chambers Has a Right to Offer the Exculpatory Testimony of Witnesses in His Favor

The accused in a criminal proceeding has a constitutional right to assert his innocence, and to show that it was not he but another person who committed the crime. He is entitled to know if the other person confessed to the crime, *Brady v. Maryland*, 373 U.S. 83 (1963), and to compel the attendance at trial of witnesses to the confession. *Washington v. Texas*, 388 U.S. 14 (1967).

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[12]The Constitution protects "basic civil rights" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)), against all but the most compelling state interests. See *Kramer v. Union Free District* 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Dennis v. United States*, 384 U.S. 855, 873 (1966) (fair trial); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (freedom to exercise religion); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (freedom of speech); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (freedom of association).

The Constitution guarantees the accused more than the mere disclosure and attendance of exculpatory witnesses. It entitles him to offer their testimony on his behalf. To that extent, the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment serve as constitutional rules of evidence. They render admissible on behalf of the accused the material testimony of witnesses in his favor.

1. The Due Process Clause Protects Exculpatory Testimony

The Due Process Clause of the Fourteenth Amendment guarantees the accused a fair trial. It gives him the right to put on evidence in his favor and to offer third-person confessions to exculpate himself. It forbids the states from acting, even in good faith, to deny him an opportunity to defend himself.

Due Process entitles the accused to put on an affirmative defense. *Specht v. Patterson*, 386 U.S. 605, 610 (1967); *Ferguson v. State*, 365 U.S. 570 (1961). It gives him the right to "present evidence" on his behalf, [13] and to "offer testimony" by witnesses in his favor:

> "A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him [and] to offer testimony . . . ." *In re Oliver*, 333 U.S. 257, 273 (1948).

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[13] "The right to present evidence is, of course essential to the fair hearing required by the Due Process Clause. And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (Opinion of Marshall, J.).

Chambers was denied the right to offer the testimony of three witnesses in his favor. The Mississippi hearsay rule barred them from reciting McDonald's confessions as exculpatory testimony. The rule prevented Chambers from putting on a defense and, thereby, violated the principles of *Brady v. Maryland*, 373 U.S. 83 (1963).

The petitioner in *Brady*, like Chambers, was found guilty of a murder to which someone else had confessed. The state denied him the benefit of the third person confession by concealing its existence. The Court reversed, holding that the state denied the petitioner Due Process when it suppressed a confession that was "material" to his defense:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

Brady concluded that the accused has a constitutional right to know of an exculpatory confession in his favor. The Court assumed that the accused could offer the confession in evidence, because state law so provided. [14] Mississippi, here, has circumvented *Brady* by challenging that underlying assumption. It has denied Chambers the benefit of McDonald's confessions—not by concealing them from him—but by rendering them inadmissible on his behalf.

The effect on the accused is the same whether the state suppresses exculpatory evidence or renders it inadmissible

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[14] Maryland permits third-person confessions to be offered under a hearsay exception for declarations against penal interest. *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961).

on his behalf. In each case, the state denies him the right to be judged by all available evidence.

A state cannot deny with one hand what Due Process forces it to disclose with the other. The Constitution does not hinge the right of disclosure on arbitrary rules of evidence. If it has any meaning, *Brady* gives the accused not only access to exculpatory testimony but an opportunity to offer it on his behalf.

It makes no difference that Mississippi allegedly applied its hearsay rule in good faith. The Court has now held unanimously that a state violates Due Process—whatever its good faith—when it effectively denies the accused the benefit of "material" evidence in his favor. See *Giglio v. United States*, 405 U.S. 150 (1972). In any event a "good faith" effort by the prosecution to see that justice was done ought to have led them to withhold technically available evidentiary objections.

McDonald's oral confessions were material evidence in favor of Chambers. Chambers based his own innocence on the evidence of McDonald's guilt. McDonald's separate confessions to Hardin, Turner and Carter were important evidence of his guilt. They were old friends and neighbors of his; he had no interest in lying to them. By any analysis, Mississippi violated Due Process by applying its rule to prevent Chambers from offering the confessions in his defense.

2. *The Compulsory Process Clause Protects Exculpatory Testimony*

The Fourteenth Amendment gives additional protection to exculpatory testimony through its incorporation of the Compulsory Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). The Compulsory Process Clause of the Sixth Amendment gives the accused the right to obtain "witnesses in his favor":

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . . " U.S. Const. amend. VI.

The right of the accused to obtain witnesses in his favor includes more than the presence of his witnesses at trial. It entitles him to offer their testimony to the jury. The Court summed it up in *Washington v. Texas,* 388 U.S. 14, 17 (1967).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies."

The petitioner in *Washington,* like Chambers, was found guilty and sentenced to life imprisonment on a charge of murder. He claimed that he was innocent and accused a codefendant of committing the crime. When he offered the codefendant's confession, however, a Texas witness rule prevented the codefendant from testifying on his behalf. The Court unanimously reversed. It declared the Texas rule unconstitutional because it prevented the accused from offering the confession to exculpate himself.

The principles of *Washington* control the present case. Texas used a witness rule to exclude the codefendant's testimony. Mississippi used a rule of evidence to bar the exculpatory testimony of Chambers' witnesses. Both rules had the same effect. In each case, they denied the accused the benefit of material testimony that someone else committed the crime.

The decision in *Washington* did not rest on the difference between witness rules and evidence rules. The result surely would have been the same if Texas had used a rule of evidence to exclude the codefendant's testi-

mony. The Compulsory Process Clause invalidates witness rules and rules of evidence alike whenever they render the exculpatory testimony of defense witnesses inadmissible: "[The] Sixth Amendment was designed to make the testimony of a defendant's witnesses admissible on his behalf in court . . . . " 388 U.S. at 22.

This case and *Washington* both involve third party confessions. The codefendant in *Washington* was ready to exonerate the accused by reciting his own confession. The witnesses here were ready to exculpate Chambers by recounting McDonald's confessions. In each case, the witnesses offered confessions to exculpate the accused.

The decision in *Washington* did not rest on the identity of the witness. The right of an accused to call witnesses does not depend on whether they recite their own confessions or the confessions of another. It depends on the importance of their testimony to his defense. The accused has a right to put his witnesses on the stand whenever their testimony is "relevant and material to the defense." 388 U.S. at 23.

In any case, the witnesses for Chambers were at least as credible as the codefendant in *Washington*. The codefendant had already confessed once and been convicted of committing the murder himself. He had nothing to lose by repeating his confession to exonerate a friend. Texas sought to exclude his confession for that very reason.

The witnesses for Chambers, on the other hand, had no personal interest in accusing McDonald. The three of them—Hardin, Turner and Carter—were old friends of McDonald. Nonetheless, they were ready to swear in McDonald's very presence that he had confessed to the murder. The independent testimony of each of them corroborated the others and was corroborated, in turn, by the eye-witness who saw McDonald shoot Liberty.

There was little reason to doubt the truth of their testimony.

B. Mississippi Has No Legitimate Interest In Applying Its Hearsay Rule

The Constitution prohibits the states from imposing burdens on fundamental freedoms for any but the most compelling reasons. The Mississippi hearsay rule, which interferes with the right of the accused to offer exculpatory testimony, furthers no legitimate governmental interest. The rule is widely discredited. It applies in an arbitrary fashion. It discriminates against the accused in favor of the prosecution. It seeks to achieve purposes that are better served by less restrictive means.

Mississippi follows the familiar rule for hearsay. It defines hearsay to include all out-of-court statements offered for the truth of the facts asserted, *Handshoe v. Daley*, 211 Miss. 189, 51 So. 2d 230 (1951), and–with numerous recognized exceptions–renders them inadmissible. *Pevey v. Alexander Pool Co.*, 244 Miss. 25, 139 So. 2d 847 (1962). It excludes hearsay on the grounds that statements untested by oath and cross-examination are inherently untrustworthy. *Citizens Bank of Coldwater v. Callicott*, 178 Miss. 747, 174 So. 78 (1937).

Mississippi has created a number of exceptions to its hearsay rule. It permits some hearsay statements to be offered into evidence where circumstances render them trustworthy. Statements that are made instinctively at the happening of an event, and without time for reflection, are admissible on the ground that they are likely to be true. *Houston Contracting v. Atkinson*, 251 Miss. 220, 168 So. 2d 797 (1964).[15]

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[15]Chambers could not take advantage of the *res gestae* exception, because the court limited it to spontaneous statements made at both the time and scene of the shooting (R. 198). McDonald

Declarations against interest, too, are admissible in Mississippi on the assumption that people do not make prejudicial statements about themselves unless they are true.[16] To fall within the exception, however, the statement must be against pecuniary interest. H. T. McElroy, *Mississippi Evidence* § 46 (1955). Declarations against penal interest do not qualify. The "hazard" to the declarant of being punished is considered insufficient to render his statements believable:

> "It is all hearsay; and no exception can be made because the party confessing has put himself in a position of some hazard .... [E]xperience justifies the rejection of the hearsay statements of a male-factor who, having no longer any concern as to his own fate, may wish to serve a pal, a kinsman, or a friend." *Brown v. State*, 99 Miss. 719, 720, 55 So. 961, 962 (1911).

Mississippi treats confessions of guilt, made out of court, like other declarations against penal interest and excludes them. Accordingly, while Mississippi permits the accused to show that someone else committed the crime charged, *Roundtree v. State*, 107 Miss. 166, 65 So. 125 (1914), it prohibits him from offering the other person's confession to do so:

> "It is well settled that testimony going to show confessions and admissions on the part of third persons made out of court is not admissible in

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confessed to Hardin, Turner and Carter some hours after the shooting and after leaving the scene.

[16]See Jefferson, *Declarations Against Interest*, 58 Harv. L. Rev. 1, 63 (1944):

> "The basis for the exception for declarations against interest comes from the disserving quality of the declaration ... which gives the declarations some element of trustworthiness and compensates to some extent for the absence of the oath and opportunity for cross-examination."

exculpation of those on trial for crime. It is mere hearsay, and is excluded for this reason . . . ." *Brown v. State*, 99 Miss. 719, 55 So. 961 (1911).

The court below reaffirmed its exclusionary rule for declarations against penal interest.[17] Justice Rogers, in dissent, would have replaced the rule with the "modern trend" (A. 157) to allow the accused to offer third person confessions to exculpate himself. But the majority, citing *Brown v. State, infra*, upheld the trial court in excluding McDonald's oral confessions:

"[T]he reason for excluding testimony like Carter's and Turner's is because it is hearsay testimony" (A. 155).

1. *The Exclusionary Rule for Declarations Against Penal Interests Is Widely Discredited*

The Mississippi rule that third person confessions are inadmissible on behalf of the accused has been condemned by the most learned students of evidence. John Wigmore writes that "the rule is an intellectual disgrace to our system of evidence." 5 J. Wigmore, *Evidence* §1476 at 284 (3d ed. 1940):

"It is therefore not too late to retrace our steps and to discard this barbarous doctrine which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly

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[17]The admission of McDonald's written confession did not derogate from the rule. The Mississippi rule provides that hearsay is excluded only if the opposing party objects. *Fieldler v. State*, 235 Miss. 44, 108 So.2d 590 (1959); *Roberts v. Interstate Life*, 232 Miss. 134, 98 So.2d 632 (1957). The state failed to object to McDonald's written confession, so the rule did not apply.

In any case, the respondent conceded in the court below that the trial court had done nothing to change the long-standing Mississippi rule on declarations against penal interest (Brief of Appellee at 16-17).

> authenticated written confession, made on the very gallows by the true culprit . . . . " *Id.* §1477 at 290.

Mr. Justice Holmes, in a famous and forceful dissent, protested the adoption of the rule for the federal courts. *Donnelly v. United States,* 228 U.S. 243, 278 (1913). More recently, the Court itself has criticized the rule. See *United States v. Harris,* 403 U.S. 473, 584 (1971) (Opinion of Burger, C. J.); *id.* at 594 (Harlan, J., dissenting). Rule 804 of the proposed federal Rules of Evidence, presently under the consideration of the Court, would abolish the rule altogether in the federal courts:

> "The refusal of the common law to concede the adequacy of the penal interest was no doubt indefensible in logic, see the dissent by Mr. Justice Holmes in Donnelly v. United States . . . . " Advisory Committee Notes to Rule 804 (second revised draft).

In the meantime, at least half of the federal circuits have already abandoned the rule.[18] A growing number of state courts, too, including California, Illinois and New York, have discarded it as "unsatisfactory and entirely arbitrary."[19] As Justice Rogers noted in the court below,

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[18] *United States v. Seyfried,* 435 F.2d 696 (7th Cir.), *cert. denied* 402 U.S. 912 (1971); *Scolari v. United States*, 406 F.2d 563, 564 (9th Cir.), *cert. denied*, 395 U.S. 981 (1969); *United States v. Dovico*, 261 F. Supp. 862 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 325, 327 n.2 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Annunziato*, 293 F.2d 373 (2d Cir.) (per Friendly, J.), *cert. denied*, 368 U.S. 919 (1961); *Mason v. United States*, 257 F.2d 359, 360 (10th Cir.), *cert. denied*, 358 U.S. 831 (1958); *Sucher Packing Co. v. Manufacturing Cas. Ins. Co.*, 245 F.2d 513, 521-22 (6th Cir. 1957), *cert. denied*, 355 U.S. 956 (1958).

[19] *Hines v. Virginia*, 136 Va. 728, 743, 117 S.E. 843, 847 (1923). See also, *Deike v. Great Atlantic & Pac. Tea Co.*, 3 Ariz. App. 430, 415 P.2d 145 (1966) (dictum); *People v. Spriggs*, 36 Cal. Rptr. 841, 389 P.2d 377, 60 Cal. 2d 868 (1964) (Traynor, C.J.);

what began as a dissent by Holmes has become virtually a "modern trend". It is a trend that commentators unanimously support.[20]

2. *The Rule Makes an Irrational Distinction Between "Penal" and "Pecuniary" Interests*

The Mississippi rule makes an arbitrary distinction between penal and pecuniary interests. It excludes declarations against penal interest, but admits declarations against pecuniary interest. *Forrest County Coop. Ass'n v. McCaffrey*, 253 Miss. 486, 176 So. 2d 287 (1965). The distinction rests on the assumption that people may lie at the risk of criminal prosecution, but not at the risk of pecuniary loss. *Baldridge v. Stribling*, 101 Miss. 666, 57 So. 658 (1912). That assumption is untenable. As Mr. Justice Holmes suggested in *Donnelly v. United States*, *infra*, the rule defies "experience, logic and common sense":

State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966); *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952); *Thomas v. Maryland*, 186 Md. 446, 47 A.2d 43 (1946); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *State v. Sejuelas*, 94 N.J. Super. 576, 229 A.2d 659 (1967); *Cameron v. State*, 153 Tex. Crim. App. 29, 217 S.W.2d 23 (1949); *People v. Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (1970).

For States that are divided on the question, see *In re Winineger's Petition*, 337 P.2d 445, 452 (Okla. Crim. App. 1959) (Nix, J., dissenting); *Alexander v. State*, 84 Nev. 737, 449 P.2d 153, 157 (1968) (Thompson, C.J., dissenting); *McClain v. Anderson Free Press*, 232 S.C. 248, 102 S.E.2d 750, 761 (1958) (Legge, J., dissenting).

[20]C. McCormick, Evidence 549-53 (1954); Model Code of Evidence Rule 509(1) (1943); Uniform Rules of Evidence Rule 63(10); Morgan, *Declarations Against Interest*, 5 Vand. L. Rev. 451 (1952); Wright, *Uniform Rules and Hearsay*, 26 U. Cinn. L. Rev. 575 (1957); Orfield, *The Hearsay Rule in Federal Criminal Cases*, 32 Ford. L. Rev. 499, 769 (1964).

"The confession of Joe Dick . . . that he committed the murder for which [Donnelly] was tried, coupled with the circumstances pointed to its truth, would have a very strong tendency to make anyone outside a court of justice believe that Donnelly did not commit the crime . . . . [T]he exception to the hearsay rule in the case of declarations against interest is well known; *no other statement is so much against interest as a confession of murder,* it is far more calculated to convince than dying declarations, which would be let in to hang a man." 228 U.S. at 277-78 (emphasis added).

Mississippi has no legitimate interest in maintaining such a distinction.[21] Having admitted declarations against pecuniary interest, Mississippi cannot arbitrarily exclude declarations against penal interest in a way that interferes with the constitutional right of the accused to offer testimony in his favor.

3. *The Rule Discriminates Against the Accused in Favor of the Prosecution*

The rule on declarations against penal interest not only rests on an irrational distinction, but discriminates against the accused. While it prevents the accused from offering another's confession to exonerate himself, it does not prevent the state from using a third person's confession to convict the accused.

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[21]Virginia was the first of a growing number of states to reject the distinction between penal and pecuniary interests:

"Is a man more likely to speak the truth to his own hurt about a pecuniary obligation or boundary line than about the more serious matter of his responsibility for crime?" *Hines v. Virginia*, 136 Va. 728, 743, 117 S.E. 843, 847 (1923).

See also, *People v. Spriggs*, 36 Cal. Rptr. 841, 389 P.2d 377, 60 Cal. 2d 868 (1964) (Traynor, C.J.).

The out-of-court confession of one conspirator, for example, is admissible against his co-conspirator. *Murphy v. State*, 129 Miss. 634, 92 So. 694 (1922). The confession of one defendant may be introduced against his codefendant. *Henry v. State*, 209 So. 2d 614 (Miss. 1968). The confession of a defendant is admissible against himself. *Sanders v. State*, 237 Miss. 772, 115 So. 2d 145 (1959). In short, Mississippi distrusts confessions only when offered by the accused in his own defense. It welcomes them, and considers them reliable when offered by the prosecution to convict.

Mississippi has no legitimate interest in enforcing against the accused a rule that it waives in favor of the prosecution. Having admitted third-person confessions and out-of-court confessions to convict the accused, it cannot exclude a third-person confession to exonerate the accused.

4. *The Purposes of the Exclusionary Rule Are Better Served by Less Restrictive Means*

The Constitution prohibits a state from enforcing rules that interfere with protected freedoms where "less drastic means" are available.[22] The hearsay exclusionary rule imposes an unnecessary burden on the right of the accused to offer testimony in his favor. Mississippi has a constitutional obligation to achieve its purposes by less restrictive means.

Mississippi excludes third-person confessions for two purposes: to prevent a third person from lying about his

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[22] "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

own guilt to save his friends; and to prevent witnesses from lying about what the third person has said. In each case, it can achieve those purposes by less restrictive methods.

The state can deter false confessions by requiring corroborative evidence. Rule 804 of the proposed Rules of Evidence for the United States Courts, for example, allows the accused to offer third-person confessions so long as they are supported by external evidence.[23] The requirement of corroboration adequately prevents friends of the accused from incriminating themselves without basis in fact.

A requirement of supporting evidence would have served Mississippi's purposes in this case. Hardin testified that he saw McDonald shoot Officer Liberty. Others saw him at the scene of the crime. He owned a gun like the one used to kill Liberty. William Vaughn saw him carrying a revolver just after the shooting. In short, the record contained abundant evidence to show that McDonald's confessions were more than gratuitous.

Mississippi also has alternatives to prevent witnesses from misrepresenting out-of-court confessions. As with all witnesses, it can test them by oath, by cross-examination, and by penalties for perjury. In addition, it can require that their testimony be corroborated.

In this case, Mississippi had the benefit of abundant testimony to corroborate Hardin, Turner and Carter. For one thing, each of the three witnesses independently supported the testimony of the others. More important, McDonald's sworn confession reinforced their testimony.

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[23]Rule 804 provides as follows:

"A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."

They said no more than McDonald admitted in his own written confession. That should have been enough to establish their trustworthiness.

Finally, the presence of McDonald himself at trial was an adequate safeguard against false confessions and false witnesses. Where the declarant is available to testify, he removes the hearsay objections to his prior statements. If he agrees with what the other witnesses say, then he adopts their testimony as his own. If he disagrees, he can challenge their testimony. See 3A J. Wigmore, *Evidence* §1018 (Chadbourn ed. 1970).

The Court in *California v. Green*, 399 U.S. 149 (1970), recognized the safeguards of having the declarant at trial. Where the declarant testifies under oath, and subjects himself to cross-examination, he cures whatever defects may exist in his out-of-court statements.

> "[N]otwithstanding the conventional characterization of an available witness' prior out-of-court statements as hearsay when offered affirmatively for the truth of the matter asserted, this is hearsay only in a technical sense since the witness may be examined at the trial as to the circumstances of memory, opportunity to observe, meaning, and veracity." *California v. Green*, 399 U.S. 149, 188 (Harlan, J., concurring) (citations omitted).

Indeed, *Green* held that the presence of the declarant justified the use of his prior statements against the accused. If his presence is enough to protect the rights of the accused, it is enough to protect the interests of Mississippi.

To conclude, the Mississippi hearsay rule is unduly harsh. The growing trend is to allow the jury to receive and weigh relevant evidence itself.[24] The Mississippi

[24] "[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of

hearsay rule has the contrary effect of "excluding relevant evidence from state criminal trials." *United States v. Wade*, 388 U.S. 218, 252 (1967) (White, J., dissenting). To that extent, it has the disadvantages of every exclusionary rule. See *Harris v. New York* 401 U.S. 222, 225 (1971); *Bivens v. Six Unknown Agents*, 403 U.S. 388, 411 (1971) (Opinion of Burger, C.J.);*Coolidge v. New Hampshire*, 403 U.S. 443, 510 (1971) (Opinion of Blackmun, J.).

In addition, it had special disadvantage here of excluding material evidence in favor of the accused. Far from protecting Chambers, the exclusionary rule prevented him from offering three separate confessions in his defense. McDonald's spontaneous confessions were precisely the kind of evidence that the jury should have heard before passing upon the defense. See Mr. Justice White dissenting in *Miranda v. Arizona*, 384 U.S. 436, 538 (1966).

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competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent . . ." *Rosen v. United States*, 245 U.S. 467, 471 (1918).

See also, *On Lee v. United States*, 343 U.S. 747, 757 (1952); *Funk v. United States*, 290 U.S. 371, 376 (1933).

II.

A WITNESS FOR THE ACCUSED BECOMES A *WITNESS AGAINST HIM* WHEN HE GIVES MATERIAL TESTIMONY THAT CONTRADICTS THE DEFENSE

The Fourteenth Amendment guarantees the accused the right to be confronted by the witnesses against him. The court below held that Chambers could confront defense witnesses only if they directly incriminated him. It denied him the opportunity to cross-examine and impeach a defense witness whose testimony directly contradicted his case.

Chambers based his claim of innocence on showing that it was not he, but McDonald who killed Officer Liberty. He called McDonald as a witness in order to introduce McDonald's sworn confession. He was not permitted to confront McDonald as an adverse witness and, therefore, examined him only to authenticate the sworn confession.

McDonald retracted his confession under cross-examination by the state and denied responsibility for the death of Officer Liberty. Chambers then renewed his request to confront McDonald as a witness against him, but the trial court ruled that McDonald was not "adverse" to Chambers. It denied that Chambers had a constitutional right to cross-examine McDonald and impeach him with prior oral confessions.

The Mississippi Supreme Court affirmed. It held that Chambers could cross-examine and impeach his own witnesses only if they directly incriminated him ("point the finger at Chambers"):

> "McDonald's testimony was not adverse to appellant; it was merely in McDonald's defense and in

> explanation for his rather unusual confession. *Nowhere did he point the finger at Chambers.* The trial judge did not abuse his discretion when he refused to allow the appellant to examine McDonald as an adverse witness" (A. 154) (emphasis added).

The court below applied a rule that abridges the right of confrontation by narrowly defining witnesses "against" the accused to mean only witnesses who incriminate him. The rule imposes an arbitrary burden on the right of the accused to cross-examine and impeach witnesses who give material testimony against him.

A. Chambers Has A Right To Confront Witnesses Who Testify Against Him

The Fourteenth Amendment guarantees the accused a fair trial, including an opportunity to confront the witnesses against him. *In re Oliver,* 333 U.S. 257 (1948). It gives him the right, generally, to cross-examine the witnesses against him, *Townsend v. Burke,* 334 U.S. 736 (1948), and to impeach their testimony with evidence of his own. *Specht v. Patterson,* 386 U.S. 605, 610 (1967).

The Fourteenth Amendment further incorporates the specific guarantee of the Sixth Amendment that the accused be confronted with "witnesses against him":

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " U.S. Const. amend. VI.

The Confrontation Clause gives the accused an explicit right to cross-examine witnesses against him, *Smith v. Illinois,* 390 U.S. 129 (1968), and to impeach them with prior inconsistent statements. *Kirby v. United States,* 174 U.S. 47, 55 (1899). The Fourteenth Amendment enforces the Confrontation Clause against the states. *Pointer v. Texas,* 380 U.S. 400 (1965).

The framers, who drafted the confrontation clause with care, did not confine the class of witnesses to be

confronted. They did not limit the class to prosecution witnesses against the accused, but extended it to *all witnesses* against him. Accordingly, the accused has the right to confront any person—whether a prosecution witness, his own witness, or a third person—who testifies against him. *Parker v. Gladden,* 385 U.S. 363, 365 (1966).

The framers also drafted the confrontation clause to protect the accused against every kind of adverse testimony. The protection is not limited to testimony that incriminates the accused, but extends to all testimony against him. It gives the accused "the right to cross-examine . . . witnesses who testif[y] against him." *Brookhart v. Janis,* 384 U.S. 1, 4 (1966).

The right of confrontation is measured, therefore, by the impact on the accused of "any . . . witness whose declarations [the prosecution] seeks to use in a criminal trial." *California v. Green* 399 U.S. 149, 174 (1970) (Harlan, J., concurring). It attaches wherever a witness offers testimony that is "damaging" (*Brookhart v. Janis,* 384 U.S. at 4) or "devastating" (*Dutton v. Evans,* 400 U.S. 74, 87 (1970) (Opinion of Stewart, J.)), or "prejudicial" (*Parker v. Gladden,* 385 U.S. at 365) to the defendant's case. The accused has a right, in effect, to confront any witness whose adverse testimony has a material bearing on his case.

McDonald gave material testimony against Chambers that directly contradicted the defense. He denied responsibility for the murder, offered an alibi for his whereabouts that night, and retracted his sworn confession.

McDonald's testimony on cross-examination was "devastating", *Dutton v. Evans,* 400 U.S. at 87 (Opinion of Stewart, J.), and the state used it directly against Chambers. *California v. Green,* 399 U.S. at 174 (1970) (Harlan, J., concurring). The testimony effectively in-

criminated Chambers, because it frustrated his effort to exculpate himself.

The jury had to weigh McDonald's credibility in deciding which of the two men killed Officer Liberty. If the jury believed that McDonald was guilty, it would exonerate Chambers. Chambers rested his defense, therefore, on being able to discredit McDonald's testimony. To that extent, McDonald became a "witness against" Chambers as soon as he testified for the prosecution.

Chambers had solid grounds for impeaching McDonald through cross-examination. Although McDonald claimed, as an alibi, that he was drinking beer with Berkley Turner at the time Officer Liberty was shot, neither Turner nor the cafe employees saw him there. Moreover, while McDonald denied having a gun on the night of the murder, the deceased Officer's own cousin saw him with a gun just after the shooting.

Chambers also had grounds for impeaching McDonald with his own words. McDonald's confessions to Hardin, Turner and Carter directly contradicted his retraction at trial. Within hours after the murder, he separately confessed to each of them that he killed Officer Liberty. His spontaneous confessions were highly inconsistent with his retraction at trial. They would have undermined his credibility as a witness.

The Confrontation Clause contained precisely the mechanism that Chambers needed for "exposing falsehood and bringing out the truth" (*Pointer v. Texas*, 380 U.S. at 404) about McDonald's testimony. With the benefit of confrontation, Chambers could have impeached McDonald through cross-examination:

> "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

In addition, he could have impeached McDonald with his own prior confessions. What was said in *Harris v. New York*, 401 U.S. 222 (1971), about impeaching the defendant with prior confessions applies with equal force to impeaching his accusers. McDonald had no "right to commit perjury" (*Id.* at 225). When he took the stand, he subjected himself to the "traditional truth-testing devices of the adversary process", including the "risk of confrontation with prior inconsistent utterances" (*Id.* at 225-26). The Confrontation Clause was designed to keep witnesses like McDonald honest.

B. The Mississippi Rule That Prevents An Accused from Impeaching His Own Witnesses Is Arbitrary and Irrational

Chambers was prevented from confronting McDonald as a witness against him because of a Mississippi rule that precludes a party from impeaching his own witnesses. The rule is arbitrary and irrational. It imposes an unwarranted burden on the constitutional right of the accused to confront witnesses against him.

Mississippi follows the rule that a party may not impeach his own witnesses. A party may impeach any opposing witness through cross-examination, *Mask v. State*, 32 Miss. 405 (1856), and prior inconsistent statements. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926). But he may not use cross-examination and prior statements to impeach his own witnesses. The rule rests on the assumption that when a party calls a witness, he "vouches for his credibility." *Clark v. Lansford*, 191 So. 2d 123 (Miss. 1966).

1. The Rule That Prevents a Party from Impeaching His Own Witnesses Is Irrational

The rule that prevents a party from impeaching his own witnesses has no rational basis. The most distinguished students of evidence have condemned it as a "serious obstruction to the ascertainment of truth." *C. McCormick, Evidence* §38 at 73 (1954). It has "no place" in a rational system of evidence:

> "The fact is that the general prohibition [against impeaching one's own witnesses], if it ever had any basis in reason, has no place in any rational system of investigation in modern society and all attempts to modify or qualify it so as to reach sensible results serve only to demonstrate its irrationality and to increase the uncertainties of litigation." *E. Morgan, Basic Problems of Evidence,* 70-71 (1962).

A growing number of states have already discarded the rule and replaced it with one that permits a party to impeach any witness, including his own.[25] At least half of the federal courts have abandoned it.[26] Rule 607 of

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[25]Alaska R. Civ. Proc. 43(g)(11) (1963); Ark. Stat. § 28-706 (1962); Cal. Evid. Code § 785 (1965); Canal Zone Code tit. 5, § 2824 (1963); Idaho Code Ann. § 9-1207 (1948); Ind. Stat. Ann. § 2-1726 (Burns 1968); Kan. Stat. Ann. § 60-420 (1965); Ky. R. Civ. P. 43.07 (1963); Mass. Gen. Laws Ann. ch. 233, § 23 (1956); Mont. Rev. Codes §93-1901-8 (1964); N.J. Evidence rule 20; N.Y. CPLR § 4514 (1963); Ore. Rev. Stat. § 45.590 (1963); Wyo. Stat. Ann. § 1-143 (1957).

[26]See, *e.g., United States v. Lineberger,* 444 F.2d 122 (4th Cir. 1971); *Ottinger v. Siegfried,* 349 F.2d 647 (10th Cir. 1965); *United States v. Stamps,* 430 F.2d 33, 37 (5th Cir. 1970) (Simpson, J., dissenting); *United States v. Freeman,* 302 F.2d 347 (2d Cir. 1962), *cert. denied,* 375 U.S. 958 (1963); *Johnson v. Baltimore & O. R. Co.,* 208 F.2d 633 (3d Cir. 1953), *cert. denied,* 347 U.S. 943 (1954).

the proposed federal Rules of Evidence rejects it altogether as a rule for the federal courts.[27]

The rule rests on the untenable premise that a party "vouches" for the credibility of his own witnesses. It assumes that a party has complete freedom in calling witnesses in his favor. It is designed to impose a moral obligation on a party to stand by his witnesses and deter him from deliberately harassing them. Both the assumption of the rule and its purposes are misplaced.

First of all, the accused in a criminal proceeding has no "free choice" about calling witnesses in his favor. He calls whatever witnesses he must in order to establish his case:

> "The traditional rule against impeaching one's own witness is. . .based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them."[28]

Chambers certainly had no choice about calling McDonald as a witness. He was forced to call McDonald in order to lay a foundation for McDonald's sworn confession. He called McDonald—not because he vouched for everything McDonald might say—but to establish part of his affirmative defense.

Second, a party has no moral obligation to defend the credibility of his witnesses. On the contrary, he had a moral obligation to see that they tell the truth. Where a party, like Chambers, believes that his own witness is committing perjury, he has a duty to expose him. The

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[27]Rule 607 provides as follows:

"The credibility of a witness may be attacked by any party, including the party calling him."

See also, Model Code of Evidence, rule 106(1) (1942); Uniform Rules of Evidence, rule 20 (1953).

[28]Advisory Committee Notes on Rule 607 of the proposed Rules of Evidence for the United States Courts.

Mississippi rule rests on a "primitive notion"[29] that would force Chambers to accept false testimony and permit the prosecution to exploit it.

Third, witnesses have no special reason to fear the party who calls them. Witnesses routinely expect to be cross-examined and impeached by the adverse party. They risk even less from the party who calls them. Indeed, honest witnesses have nothing to risk from the impeachment process. Only unreliable witnesses have reason to fear that they will be discredited.[30]

2. *The Rule Operates in an Arbitrary Manner*

The rule that prohibits a party from impeaching his own witnesses does not operate in a consistent manner. Its own exceptions belie any pretense that the rule may rest on rational grounds.

The rule prohibits a party from using cross-examination and prior statements to impeach his own witnesses. At the same time, however, it permits a party to impeach them with contradictory facts. *Manning v. State,* 188 Miss. 393, 195 So. 319 (1940). If the rule seriously intended a party to "vouch" for his witnesses, it would forbid impeachment altogether.

The rule makes further exceptions. A party may call and impeach the opposing party. *Miss. Code* § 1710 (1942). He may impeach witnesses whom he has a legal

[29] "This primitive notion, resting on no reason whatever, but upon mere tradition, and irrationally forbidding any attempt to question utterances of one's own witness, was obliged to yield its ground before reason and common sense." 3A J. Wigmore, *Evidence* § 898 at 661 (Chadbourn, ed. 1970).

[30] "[The risk of impeachment] cannot appreciably affect an honest and reputable witness. The only person whom it could concern is the disreputable and shifty witness; and what good reason is there why he should not be exposed." *Id.* at § 899, at 664.

obligation to call. *Clark v. Lansford,* 191 So. 2d 123 (Miss. 1966). Moreover, he may impeach witnesses who surprise him with "hostile" testimony by giving either unresponsive answers, *Hall v. State,* 250 Miss. 253, 165 So. 2d 345 (1964), or inconsistent statements. *Dunk v. State,* 84 Miss. 452, 455, 36 So. 609, 610 (1904). Finally, he may impeach witnesses who give "adverse" testimony by directly incriminating him, *Chambers v. Mississippi* (A. 150-58), or by necessarily contradicting his case. *Chism v. State,* 70 Miss. 742, 12 So. 852 (1893).

The exceptions to the rule show how irrational it really is. Considered as a group, they are implicitly designed to avoid the rule altogether by accomodating practically every case in which a party may wish to impeach his own witness. Nonetheless, when cases arise that are not covered by the exceptions, the rule applies in unwonted fashion to prevent a party from confronting the witnesses against him.

Chambers could not claim to impeach McDonald as an opposing party, or as a witness he was legally obliged to call. He could not claim to be "surprised" by McDonald's hostile and inconsistent testimony. And because McDonald did not directly incriminate him ("point the finger at him"), he could not treat McDonald as an adverse witness. In short, despite the myriad exceptions that have arisen to bypass the rule, the rule nonetheless applied to bar Chambers from confronting a material witness against him.

The exceptions to the rule are scarcely better than the rule itself. A party should not have to show that hostile testimony surprised him. It should be enough that the witness may be lying. While McDonald's testimony hardly surprised Chambers, it directly disputed McDonald's own prior statements. The state has an interest in resolving such contradictions through the impeachment process.

Nor should a party have to show that an adverse witness has incriminated him. It should be enough that they have contrary interests, and that the witness gives material testimony that directly undermines the defense.[31] In this case, McDonald was the only other person suspected of killing Officer Liberty. To that extent, he and Chambers had opposing interests in the outcome of the trial. By denying that he killed Liberty, moreover, McDonald directly repudiated the basis on which Chambers rested his case.

3. *The Purposes of the Rule Are Better Served by Less Restrictive Methods*

The Mississippi rule has two purposes: to prevent a party from harassing his own witness; and to eliminate the "moral" dilemma of allowing a party to call a witness and then discredit him. For each purpose, however, the rule is unnecessarily harsh. The state can serve its objectives without imposing burdens on the right of the accused to confront witnesses against him. In light of the alternatives, Mississippi cannot justify the effect of its rule.

The courts of Mississippi have inherent power to prevent a party from harassing his own witnesses. They routinely regulate the manner in which witnesses are examined. See *Smith v. Illinois*, 390 U.S. 129, 133 (1968) (White, J., concurring). They are fully capable of protecting witnesses from overzealous cross-examination by the adverse party. *Alford v. United States*, 282 U.S.

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[31] The federal rule treats adverse witnesses with greater latitude than Mississippi. The party in a federal court may impeach his own witnesses whenever they give "prejudicial" testimony that has a "material" bearing on his defense. *Hickory v. United States*, 151 U.S. 303, 309 (1894). See also Rule 43(a) of the Federal Rules of Civil Procedure, as construed in *Rossano v. Blue Plate Foods, Inc.*, 314 F.2d 174, 178 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963).

687, 694 (1931). Similarly, they can protect a witness from malicious cross-examination by his own party, without forbidding cross-examination altogether.

Mississippi also has alternatives to solve whatever moral dilemma may arise when a party first calls a witness and then discredits him. Where neither party wishes to call a witness, the court can call him as a witness of the court and subject him to neutral examination and impeachment by both parties:

> "The rule which permits the trial court to call and examine witnesses. . .is quite a reasonable one and is well recognized. If judiciously exercised, it is productive of no harm; and many times, by extending to attorneys the right to cross-examine and impeach on material matters, it prevents a failure of justice." *Litsinger v. United States*, 44 F.2d 45, 47 (7th Cir. 1930).

A number of states have already solved Mississippi's dilemma by providing for witnesses of the court.[32] The federal courts follow the same practice.[33] It satisfies the purposes of the Mississippi rule while avoiding constitutional defects.

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[32] *Kissic v. State*, 266 Ala. 71, 94 So. 2d 202 (1957); *People v. Donovan*, 272 Cal. App. 2d 413, 77 Cal. Rptr. 285 (1969); *Daugherty v. State*, 154 Fla. 308, 17 So. 2d 290 (1944); *People v. Williams*, 22 Ill. 2d 498, 177 N.E.2d 100 (1961), *cert. denied*, 369 U.S. 806 (1962); *State v. Hines*, 270 Minn. 30, 133 N.W.2d 371 (1964); *Portales v. Bell*, 72 N.M. 80, 380 P.2d 826 (1963); *Commonwealth v. Burns*, 409 Pa. 619, 187 A.2d 552 (1963); *Montesi v. State*, 220 Tenn. 354, 417 S.W.2d 554 (1967); *Stoots v. Commonwealth*, 192 Va. 857, 66 S.E.2d 866 (1951); *State v. Loveless*, 140 W. Va. 875, 87 S.E.2d 273 (1955).

[33] *Estella-Ortega v. United States*, 423 F.2d 509 (9th Cir. 1970); *Smith v. United States*, 331 F.2d 265 (8th Cir. 1964), *cert. denied*, 379 U.S. 824 (1964); *United States v. Browne*, 313 F.2d 197 (2d Cir. 1963). See also Rule 614(a) of the proposed Rules of Evidence for the United States Courts.

To conclude, Mississippi has no legitimate interest—even as a matter of state law—in preventing parties from impeaching their own witnesses. It may choose to use the rule to regulate the examination of witnesses, but the Sixth and Fourteenth Amendments preclude it from using the rule in a criminal case to prevent the accused from confronting the witnesses against him.

CONCLUSION

The Mississippi rules at issue here applied to deny Chambers a fair trial. The hearsay rule barred him from offering material confessions to exculpate himself. The party-witness rule prevented him from impeaching material testimony against him. Taken individually and together, the rules frustrated his constitutional right to put on a defense.

The Constitution guarantees to every accused an opportunity to defend himself. The Due Process Clause of the Fourteenth Amendment stands as a procedural guardian to ensure the accused "a right to his day in court". *In re Oliver*, 333 U.S. 257, 273 (1948). It demands, as a minimum, that he enjoy the combined opportunity to offer evidence in his favor and to impeach the evidence against him:

> "Due Process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

The Due Process Clause further incorporates the protections of the Sixth Amendment. The Sixth Amendment was framed to embody in a single article the basic incidents of a fair trial.[34] Besides trial by jury, indict-

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[34] J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 445 (1971).

ment by grand jury, and assistance of counsel, it protects the presentation of evidence. Specifically, the Compulsory Process Clause gives the accused the right to offer testimony in his favor, and the Confrontation Clause gives him the right to impeach testimony against him. Together, they "constitutionalize the right to a defense as we know it." *California v. Green,* 399 U.S. at 176 (Harlan, J., concurring).

The "right to a defense" includes an opportunity for the accused to offer whatever material testimony favors his case, and to impeach whatever material testimony prejudices his defense. In this case, Mississippi rules had just the opposite effect. They not only barred Chambers from putting on his own case, but forced him to accept McDonald's case for the State.

The Mississippi rules deprived Chambers of his day in court. While the rules may be valid on their face, they are unconstitutional as applied in his case. The judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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